

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF WASHINGTON

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 No. CR-10-2060-FVS

6 v.

7 OSCAR CRISOSTOMO-RIOS,

8 Defendant.

9 ORDER DISMISSING INDICTMENT

10 **THIS MATTER** came before the Court on Defendant's Motion to
11 Dismiss the Indictment. (Ct. Rec. 29). Assistant United States
12 Attorney Alexander C. Ekstrom appeared on behalf of the United States.
13 Defendant was represented by Alex B. Hernandez.

14 **BACKGROUND**

15 On June 15, 2010, Defendant was charged by indictment in this
16 district with being an Alien in the United States After Deportation.
17 (Ct. Rec. 13). Defendant was previously deported and/or removed from
18 the United States on March 11, 2006, April 17, 2007, July 2, 2007, and
19 March 7, 2009. (Ct. Rec. 38 at 1-3). Defendant argues that his due
20 process rights were violated by defects in the underlying deportation
21 proceeding on March 11, 2006, and that he suffered prejudice as a
22 result of the defects. (Ct. Rec. 30).

23 **DISCUSSION**

24 **I. COLLATERAL ATTACK**

25 An alien charged with a Section 1326 violation may collaterally
26 attack a "deportation order that constituted an element of a criminal

1 offense." *United States v. Herrera-Blanco*, 232 F.3d 715, 718 (9th
2 Cir. 2000). To prevail on a collateral attack, an alien must show (1)
3 that the underlying deportation proceeding violated his right to due
4 process and (2) that he was prejudiced by the violation. *Id.*

5 The Court has determined that the validity of the underlying
6 deportation proceeding may be collaterally attacked in this criminal
7 proceeding.

8 **II. WAS THE MARCH 11, 2006 DEPORTATION PROCEEDING PROCEDURALLY
DEFECTIVE?**

9 Defendant argues that his March 2006 removal proceeding was
10 defective because the Immigration Judge ("IJ") failed to advise him of
11 his eligibility for fast-track voluntary departure in lieu of removal.
12 (Ct. Rec. 30 at 4).

13 Voluntary departure is a form of relief from deportation. In
14 *United States v. Ortiz-Lopez*, 385 F.3d 1202, 1204 (9th Cir. 2004), the
15 defendant successfully argued that his due process rights were
16 violated in the underlying deportation proceeding because the IJ
17 failed to inform him that he was eligible for a voluntary departure in
18 lieu of removal. "The requirement that the IJ inform an alien of his
19 or her ability to apply for relief from removal is mandatory, and
20 failure to so inform the alien of his or her eligibility for relief
21 from removal is a denial of due process that invalidates the
22 underlying deportation proceeding." *United States v. Ubaldo-Figueroa*,
23 364 F.3d 1042, 1050 (9th Cir. 2004) (internal quotation marks
24 omitted); see also *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th
25 Cir. 2000) (holding that a due process violation arose when the IJ
26

1 failed to perform the mandatory obligation to inform defendant of his
2 eligibility for relief from deportation); *Moran-Enriques v. INS*, 884
3 F.2d 420, 422-423 (9th Cir. 1989) (where the record contains an
4 inference that the petitioner is eligible for relief from deportation,
5 "the IJ must advise the alien of this possibility and give him the
6 opportunity to develop the issue.")

7 Here, unlike the above cases, Defendant was deported without a
8 hearing, based on his signature on a four-page document entitled
9 "Respondent's Stipulated Request For Order; Waiver Of Hearing Pursuant
10 to 8 C.F.R. 3.25(b)" ("Waiver"). 8 C.F.R. § 3.25(b) (now 8 C.F.R. §
11 1003.25) provides that an IJ may enter an order of deportation without
12 a hearing and in the absence of the parties following a review of the
13 charging document, written stipulation and supporting documents, if
14 any. 8 C.F.R. § 3.25(b). Therefore, a valid Section 3.25 waiver will
15 nullify the requirement of an IJ to advise the alien, in person, of
16 his eligibility for relief from removal. However, § 3.25(b) further
17 provides that, "[i]f the alien is unrepresented, the Immigration Judge
18 must determine that the alien's waiver is voluntary, knowing, and
19 intelligent." *Id.*

20 Here, there is no evidence that the IJ engaged in any fact-
21 finding efforts to determine the validity of Defendant's waiver. The
22 Waiver in this case cannot be deemed valid because there was no
23 determination made by the IJ that the Waiver by Defendant, an
24 unrepresented alien, was "voluntary, knowing, and intelligent." 8
25 C.F.R. § 3.25 (now 8 C.F.R. § 1003.25). Because there is no
26 indication regarding whether Defendant's waiver was considered and

1 intelligent, the Waiver was invalid. Consequently, Defendant's
2 defective 2006 deportation proceeding violated Defendant's right to
3 due process.

4 **III. DID THE DEFECT IN THE MARCH 2006 DEPORTATION PROCEEDING PREJUDICE
DEFENDANT?**

5 Notwithstanding a procedural defect in Defendant's deportation
6 hearing, Defendant must still show prejudice as a result of that
7 defect in order to preclude the Government's use of the deportation
8 order as the basis for this criminal proceeding. Defendant can
9 demonstrate prejudice in this case only by showing that he had
10 plausible grounds for relief from deportation. *Arrieta*, 224 F.3d at
11 1079.

12 Defendant indicates that he would have taken advantage of fast-
13 track voluntary departure had he been advised by the IJ that this form
14 of relief from removal was available. An alien may be eligible for
15 fast-track voluntary departure as long as he is not barred from relief
16 due to terrorism-related activities or an aggravated felony. 8 U.S.C.
17 § 1229c(a); 8 U.S.C. § 1227(a).

18 Here, Defendant alleges that he did not have a conviction which
19 would have prevented him from being eligible for fast-track voluntary
20 departure. The government has not contested that Defendant was
21 eligible for voluntary departure. Accordingly, Defendant has
22 satisfied his burden of showing a "plausible ground for relief."

23 **CONCLUSION**

24 Having established both a due process violation and resultant
25 prejudice, the Court finds that the March 2006 deportation was
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1 unconstitutional. Consequently, the subsequent orders reinstating the
2 2006 deportation order were likewise constitutionally invalid. Based
3 on the foregoing, the Court finds that Defendant's indictment must be
4 dismissed. See *Ubaldo-Figueroa*, 364 F.3d at 1050-1051. The Court
5 being fully advised, **IT IS HEREBY ORDERED:**

6 1. The Defendant's Motion to Dismiss the Indictment (**Ct. Rec.**
7 **29**) is **GRANTED**.

8 2. The charge set forth in the Indictment (Ct. Rec. 13) is
9 **DISMISSED**.

10 3. All pending motions (**Ct. Rec. 22, 24 & 26**) are **DENIED AS**
11 **MOOT**.

12 **IT IS SO ORDERED.** The District Court Executive is hereby
13 directed to enter this order, furnish copies to counsel, and **CLOSE THE**
14 **FILE**.

15 **DATED** this 31st day of August, 2010.

16 _____
17 S/Fred Van Sickle
18 Fred Van Sickle
19 Senior United States District Judge
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